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Copyright Update 2013

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Copyright Update 2013

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2012 – A VERY EXCITING YEAR in COPYRIGHT!

- **Changes to the Copyright Act**
- **Copyright decisions in the Supreme Court**
- **Ongoing matters before the Copyright Board of Canada**
  - Not all these changes will have any effect on your library…
- **Changing patterns of collections development in libraries**
- **Differing institutional responses to copyright affecting libraries differently**
  - A new reality in librarianship
- **Continuing progress for an international treaty on "library exceptions" at UN's World Intellectual Property Organization and new support in this direction through UNESCO…**
  - See the VANCOUVER DECLARATION from the 1st UNESCO conference ever held on Canadian soil, last September (2012)

It is impossible to eliminate uncertainty in change --

- **How to approach all this change?**
  - **Focus on the meeting the needs of <u>your</u> users – professional responsibility –**
  - **Don't be afraid when there are differences in direction between different institutions -- focus on *your* users…**
  - **No actions by any institution with respect to copyright can be criticized fairly unless there is proof that that institution has failed to meet the needs of its users for the widest possible access to sources which meet those users' needs…**

"[Library staff have] individual and collective responsibility to:

…

3. Facilitate access to any or all sources of information which may be of assistance to library users." [CLA Code of Ethics(1976)]

It is becoming very clear that there is no "one size fits all" for libraries in copyright now:

The decisions in your library will depend upon at least four factors which, I think when you analyze your own situation, you will find, in sum, create a profile unique to your particular institution:

1. **What is the governance structure of your institution (not your library: your institution)?**
2. **How have you been building your collection: by purchase or by license?**
3. **Is there a copyright collective associated with any of the kinds of things that you do, with works that are represented by that collective?**
4. **What are your users' information needs and how are they best satisfied given your resources?**

Understanding your library's situation:

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What is the governance structure of your institution?

This has become a very important questions for libraries for at least three reasons related to copyright:

1. **If your institution is either a "Library, Archive or Museum" or an "Educational Institution" as defined by the Copyright Act, you have special privileges under the Act that your fellow librarians in other institutions cannot access.**
   - Right away this divides libraries across our "types of libraries" divides:
     - **public libraries are LAMs but not EIs**
     - **libraries in private, for-profit colleges and universities are neither LAMs nor EIs**
     - **special libraries in government are LAMs but special libraries in the private sector are not – and so on…**

Are teaching hospitals "Educational Institutions" within the meaning of the Copyright Act? Is the specific hospital:

(a) A non-profit – or part of a non-profit – institution "licensed or recognized by or under an Act of Parliament or the legislature of a province to provide … post-secondary education"?

OR

(b) A "department or agency of … any non-profit body, that controls or supervises education or training [licensed or recognized by the federal or provincial government at the post-secondary level or that is continuing , professional or vocational]"?

From the s.2 definition of educational institution

Why is knowing the governance of your institution important?

2. **If your "sector" has been targetted by the AccessCopyright collective, you are now concerned about the tariff process:**
   - Again, this process has targetted a certain set of types of libraries but not, other libraries which librarians would classically have considered similar:
     - Government libraries owned by provinces and territories are part of current proceedings before the Copyright Board initiated by AccessCopyright but federal government libraries and local government libraries are not…
     - K-12 schools were targetted by Access Copyright first and separately from the post-secondary sector – but both colleges and universities were targetted together by Access Copyright in a second tariff application

Examples of governance differences:

- **Are colleges and universities governed the same way?**

NO

Most universities in Ontario operate under a bicameral structure where Senates govern academic matters and the Board of Governors govern all other matters, including copyright, and each is separately founded under its own unique statute …

Ontario's public colleges do not have this bicameral structure – only Boards of Governors – and all are governed by the Ontario *Colleges of Applied Arts and Technology Act, 2002* under which the Minister [of Colleges and Universities] may give binding policy directives with which the colleges comply

Are all health librarians working in institutions that are governed the same way?
NO And so on…

Sometimes differences in governance are unique to copyright matters!

- **Public libraries in Ontario are governed by Library Boards –**
- **Schools in Ontario are governed by School Boards –**

Do boards control decisions about copyright in both public libraries and school libraries?

NO

Public library boards control decisions about copyright BUT the Education Act was amended in 1991 so that School boards retain the right to make decisions for copyright uses except those involving the right to "copy" where

s.8(1) The Minister [of Education] may…

23.1 enter into a licence agreement to permit boards to copy, under the terms of a license agreement, works protected by copyright, and to

(a) extend the rights under the license agreement to boards, and

(b) require boards to comply with the terms of the license agreements.

Understanding your library's situation:

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(1) Licenses are contracts …

• How much of your institution's collection is actually obtained through licenses from vendor's?

• The more digital your collection, the more likely it is to have been acquired through ongoing licensing arrangements rather than outright purchases…

• In some libraries, up to 95% of the collection is subscriptions to databases…

• To the extent this represents your library, the changes to the *Copyright Act* and the cases decided by the Supreme Court under the *Copyright Act* will not directly affect your library because these changes do not directly affect your licensed collection… you only get the rights under the license which are specified in the license…

• If your collection is 100% licensed directly from vendors, you do not need a blanket license from AccessCopyright or to accede to a tariff from it – and you will not be relying on statutory users' rights such as fair dealing directly…

(2) Contracts can override the Copyright Act– but you can try to negotiate the provisions of the Canadian Copyright Act into contracts

- **The parties can specify what law will apply to a contract (law of Delaware, for instance)**
- **The only way Canada's *Copyright Act* will apply to the terms of a license is if you and the vendor agree that it will and put that in the license**
- **A vendor can refuse to agree to Canada's** Act **governing – and, even if agreeing to be bound by the *Act* -- can refuse to agree to any changes to the *Act* made during the lifetime of the contract applying to that contract**
- **A vendor can negotiate for a higher license fee in return for agreeing to have the Act apply or changes to it to apply**
- **Therefore "fair dealing" only gets into a license if it is agreed between the parties to be there and sometimes it can cost you money to negotiate it in…**

There are many examples of library licenses where Canadian law and Canadian fair dealing have been negotiated in:

- **Kawartha Lakes Public School Board licenses negotiated under Jason Bird when he was there – and discussed in previous OLA Superconference sessions**
- **Consortial licenses in the academic library environment**
- **Western and U of T in their blanket licenses negotiated with AccessCopyright**

No 2 of these 3 examples of licenses are actually licenses for the same KINDS of products – licenses are a way of obtaining all kinds of different products and services… but, in all of them, the purchasing institutions knew that the *Copyright Act* does not apply directly to the terms and conditions of licenses and thought it was valuable to obtain certain copyright flexibilities from the vendors that appear in the Canadian *Copyright Act*

Contracting in users' rights is not the same as relying on the statute:

These contracts achieve for the library's users just as many rights in an information product as those users would have had had the product been purchased outright and not subject to an ongoing contract because users have the rights enshrined for them in the *Copyright Act* (in any exception section, including, but not limited to, fair dealing) BUT the institution may have had to pay to get this equivalence because Parliament has not made the statute override contract (as Ontario has done, for example, in many areas of landlord and tenant contract law).

So, this is not really STATUTORY fair dealing – it is institutions acting on behalf of users to ensure that users are not disadvantaged by license arrangements as opposed to purchases – and the institutions may have had to pay something to ensure this level of service…

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S.3 RIGHTS (applies to works, not sound recordings, broadcasts, performers' performances)	ASSOCIATED COLLECTIVE SOCIETIES
Produce or Reproduce the Work	Access Copyright (writing) COPIBEC (writing) AVLA (music: videos & audio) CMRRA (audio & music) SODRAC (music & visual arts) CARCC (visual arts)
Perform the Work in Public	ACF (films) AVLA (music: videos & audio) Criterion Pictures (films) ERCC (tv & radio – education only) SOCAN (music) SoQUAD (theatre – education only) SODRAC (music & visual arts)
…[rights not represented by collectives] eg Translation…	
(f) Communicate the Work by Telecommunication	CRC (tv & film) CCC (US movies and tv) FWS (sports) MLB (baseball) SACD (theatre, film, radio) SOCAN (music) SODRAC (music & visual arts)
…[rights not represented by collectives] eg. To present art at exhibit	

Part VII of the Copyright Act (1997)

- Collective societies for the performance of music and sound recordings (e.g. SOCAN) MUST file Tariffs before the Copyright Board
  - Copyright Act, s.67.1 – old provision, modified in 1997
- On the other hand, collective societies such as Access Copyright
  - MAY file Tariffs before the Board (s.70.12 (a)) OR
  - MAY enter into agreements with users (s.70.12(b))
    - s.70.12 a new provision 1997
- Over the course of 2012 Access Copyright moved into the position of *simultaneously* seeking a Tariff for post-secondary institutions AND entering into agreements… unprecedented

Institutions who do not use the rights which Access Copyright markets do not have to pay

- "Bold" post- secondary institutions, since the Tariff has been filed by Access Copyright, have chosen not to use the "product" Access Copyright is selling
- If an institution does NOT make use of works in ways covered by the rights Access Copyright sells, or buys only from rights holders not represented by Access Copyright, then the institution is outside the Tariff, does not have to pay it, or pay into Access Copyright through any other agreement

The lure of sticking with the Tariff process-

- **70.17** … no proceedings may be brought for the infringement of a right referred to in section 3… against a person who has paid or offered to pay the royalties specified in an approved tariff.

Currently all K-12 (except Quebec); all provincial & territorial governments; some post-secondary

The advantage to the whole community is that someone is "fighting" the evidence brought by Access Copyright to support their "price"

Until January 2012, Access Copyright had left post-secondary institutions with 2 choices:

1. Expect to pay the Tariff, OR
2. Arrange the institution so that the rights Access Copyright is selling are not used

Then Access Copyright created 3 options for post-secondary institutions by negotiating with U of T and Western:

1. Expect to pay the Tariff, OR
2. Negotiate a license (presumably along the lines of the AUCC and ACCC models), OR
3. Arrange the institution so that the rights Access Copyright is selling are not used

No one knows the future…

- If an institution can successfully operate without the rights marketed by Access Copyright
  - It saves itself money AND
  - It reduces the market value of Access Copyright's product overall, which benefits all post-secondary institutions (and other institutions)
- By negotiating licenses with Access Copyright in the face of Access Copyright's Tariff application, Toronto and Western helped open up a 3rd option for post-secondary institutions – a return to licensing
- By staying the course and opposing the Tariff application, post-secondary institutions help to ensure that the Board hears all sides of the valuation question and that the resulting tariff ordered is less than the $45 FTE sought and, perhaps even less than the $26 FTE (or $10) negotiated in the model licenses

All post-secondary institutions are playing valuable roles in the process:

- ACCESS COPYRIGHT is the prime mover all the way through this current situation:
  - Access Copyright proposed the Tariff in the first place
  - Access Copyright is the one with the right to either move by way of Tariff or agreement under s.70.12
  - Access Copyright is the party threatening litigation for infringement should "bold" institutions be found to be infringing
- ALL post-secondary institutions are participating in, and contributing to, opposition to the proposed $45 FTE tariff, in different ways

Where do the Tariffs before the Copyright Board sit?

- **Access Copyright K-12 2005 – 2009**
  - Determination now completed (Tariff released Jan 19, 2013)
    - **$4.81 per student per year; down from $5.16 originally awarded by the Board…**
- **Access Copyright K-12 2010-2012**
  - Filed with the Board 2009…
- **Access Copyright K-12 2013 – 2015**
  - filed with the Board (published in Canada Gazette June 16, 2012)
- **Access Copyright Provincial and Territorial Governments 2005-2009 AND 2010-2014**
  - Heard by the Board; **decision pending**
- **Access Copyright Post-secondary 2011-2013**
  - Set for hearing by the Board Feb 14, **2014**

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The provisions concerning Digital Locks

Now illegal to circumvent a digital lock (s.41.1 (a)) with the following exceptions:

- encryption research (s.41.13)
- law enforcement (s.41.11)
- to allow interoperability between programs where a person owns or has a license for the program and circumvents its TPM (s.41.12)
- where a person is taking measures connected with protecting personal data (s.41.14)
- verifying a computer security system (s.41.15)
- *making alternative format copies for the perceptually disabled (s.41.16) – just mentioned*

- **no exception here about circumvention in aid of ILL or for fair dealing or where the works "behind" the locks are out of copyright…**

Libraries face limited consequences for circumvention:

First, s.41.2 says "If a court finds that a defendant that is a library … has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction." – other defendants may find themselves paying damages [$$] or facing other remedies.

Second, under **s. 42 (3.1)** ordinary Canadians, but never libraries, face

(*a) on conviction on indictment,* … a fine not exceeding $1,000,000 or … imprisonment for a term not exceeding five years or … both; or

(*b) on summary conviction,* … a fine not exceeding $25,000 or … imprisonment for a term not exceeding six months or … both.

What are your users' information needs and how are they best satisfied given your resources?

- **If digital locks are a problem with respect to accessing a given work –**
  - You cannot rely upon your statutory users' rights…
  - It may be best to negotiate a license to the work, into which you negotiate that digital locks be eliminated…

Consider avoiding copyright altogether by linking to information on the web rather than "acquiring" the information by any means…

Crookes v. Newton (2011 SCC 47) in the Supreme Court - on linking

Defamation (libel) case, not copyright, but about "publication"

- **The majority, Abella, Binnie, LeBel, Charron, Rothstein and Cromwell, were clear that linking does not constitute publication:**

  "Making reference to the existence and/or location of content by hyperlink… is not publication of that content." [para.42 (Abella)]

  Justice Abella made the analogy between a reference in the traditional paper publishing world and the link in the new digital internet realm and said they perform the same function and therefore "a hyperlink, by itself, is content neutral"[para.30]

Although copyright is not mentioned, the way in which the majority expresses itself leaves little doubt that the Court would think the same way in a copyright case.

If you wish to rely upon statutory users' rights…

The *Copyright Modernization Act*, which is now virtually entirely in force and has made substantial amendments to the *Copyright Act*, has given some libraries advantages through the Libraries, Archives and Museums exceptions, and others advantages through the Educational Institutions exceptions…

e.g. LAM change Section 30.1- Preservation

Paragraph 30.1(1)(*c) of the Act is* replaced by the following:

(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete **or is becoming obsolete**, or that the technology required to use the original is unavailable **or is becoming unavailable**;

NOTE:

All the other restrictions in s.30.1 (commercially available) still apply
Library cannot use this provision for something that is protected by a digital lock.

e.g. Changes in the restrictions in 30.2 for LAMs serving their own users:

• s.30.2(4) used to place restrictions on libraries copying for their own patrons…

The restrictions are slightly amended now: the patron only gets a single copy and the library informs the patron the copy is only for research or private use and any other use may require the copyright holder' s permission.

e.g. Changes in the restrictions in 30.2 for LAMs **engaged in ILL**:

• In addition to the things you can do for a patron in your own library, in a case of ILL you can also do more:

•30.2(5.02) states that *the copy given to the patron may be in digital form*

- If the user requesting is warned [“the providing library… takes measures to prevent the person who has requested it”]
  - From only making more copies than just1 print copy, or
  - Giving the digital copy to anyone, or
  - Using the digital copy for more than 5 business days from the first use.

Changes involving alternate format copies – for all libraries, not just LAMs and EIs…

s.32 allows the creation of alternate format copies for folks with perceptual disabilities.

Under a revised s.32.01 not for profits can make copies for the perceptually disabled, as can other “persons” or the perceptually disabled person.

s.32.01 is a new addition which allows export of those alternate format copies for use by people in other countries.

There is also a section allowing very limited rights to circumvent digital locks for the perceptually disabled s.41.16

If there are no digital locks, or a contract, or a tariff, you can rely on **fair dealing** rights if they apply --

Sections 29 – 29.2 – can be used instead of relying upon LAM or EI exceptions

> **"… the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption. " [para 49, Law Society case, 2004]**

A copy made for under the fair dealing provisions does not infringe

But the scope of fair dealing is uncertain --

Fair Dealing is now a users' right for eight purposes: (1) research, (2) private study, (3) review, (4) criticism, (5) news reporting, (6) parody, (7) satire and (8) education

BUT

The Six "Fair Dealing" Factors from SCC in 2004 were not changed by latest *Copyright Act* amendments

The "pentalogy" cases, including the ***Bell*** judgment and the ***Alberta Minister of Education*** **[K-12]** judgment, were decided by the SCC before the *Copyright Modernization Act* came into effect and amended the *Copyright Act* – and neither of the judgments referred at all to the pending amendments –

Even if "education" is interpreted as a very broad category, which all libraries can claim, it is unlikely that all uses of films will meet the test of the six factors and be found to be fair dealings…

The Six Factors set out by SCC were not changed by latest *Copyright Act* amendments

In the CCH judgment, six factors were provided for deciding whether something was a fair dealing or not. The six factors are:

1. *purpose,*
2. *character,*
3. *amount,*
4. *alternatives,*
5. *nature, and*
6. *effect*.

Recent Supreme Court "Pentalogy" July 12, 2012 included two decisions on Fair Dealing - but before the changes to the Copyright Act

(1) SOCAN v. Bell (related to 2004 Tariff 22 SCC decision)

squarely fair dealing:

An offer to the public to "preview" 30 seconds or less of a musical work.

Is this a taking for which a Tariff should be set to compensate SOCAN's members or is this a fair dealing for which no compensation (and thus no Tariff) should be set? Copyright Bd, FCA fair dealing; unanimous SCC agreed

(2) Ministers of Ed v Access Copyright (the K-12 tariff)

squarely fair dealing:

Teacher-initiated copies for classroom use can be "research" or "private study" (2 of the 5 categories) and may be fair (meet the six factor test) – were they here?

Majority of court then said Board did not apply 6 factors properly and sent the determination back to the Board (minority would have accepted Board's finding of fair)

The Copyright Board has completed these processes in an order issued January 18, 2013 which reduced the tariff from $5.16 per FTE per year to $4.81.

(3) Entertainment Software v. SOCAN

(4) Rogers v SOCAN -

(5) Re:Sound v Motion Pictures

"Price discovery" is a natural new product positioning process ---

- If libraries and librarians do not support each other in the face of uncertainty, it seems certain that their mutual adversary, Access Copyright, is the beneficiary of the dissention.
- All libraries, including the 3 groups of post-secondary institutions, are engaged in "price discovery" and making valid contributions to that process.
- In the face of uncertainty, and without a crystal ball, it is ridiculous to oppose ANY serious effort at price discovery.

How can you manage in uncertainty?

1. **What is the governance structure of your institution (not your library: your institution)?**
2. **How have you been building your collection: by purchase or by license?**
3. **Is there a copyright collective associated with any of the kinds of things that you do, with works that are represented by that collective?**
4. **AS ALWAYS IN LIBRARIANSHIP, FOCUS ON:**

   What are your users' information needs and how are they best satisfied given your resources?

Thank you. Some resources:

1. Robert Tiessen (2012), "How copyright affects interlibrary loan and electronic resources in Canada" *Interlending & Document Supply*, Vol. 40 No.1, 49 - 54

2. Margaret Ann Wilkinson (2011), **"Access to Digital Information: Gift or Right?,"** chapter 14 in Mark Perry and Brian Fitzgerald (eds) *Knowledge Policy for the 21st Century: A Legal Perspective* (Toronto: Irwin Law, 2011) , 313-340.

3. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf

4 . Copyright Board of Canada http://www.cb-cda.gc.ca/

5. Margaret Ann Wilkinson (2010), "Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries" in Michael Geist (ed.) *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*(Toronto: Irwin Law), 503-540.